Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term 1997

NANCY PRESCOTT,

Petitioner,

v.

G.I.W. INDUSTRIES, INC., and
KSB AMERICA COMPANY,

Respondents.

Petition For a Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Worksharing Agreement

1. When a charge is filed with an EEOC cooperating agency, or individual, must a plenary jurisdictional determination be made, and proper "geographic", or other similar subject matter jurisdiction be shown at the time of filing, to find that the charge is timely filed, or does the mutual agency designation of the EEOC's standard Workshare Agreement create a filing, on receipt of the written, verified charge by the cooperating agency, given the EEOC's statutory authority and mandates.

Electronic Filing

2. Is a Title VII charge timely filed with the EEOC, where information from a written and verified charge is converted, as required by the EEOC to digital form, by a cooperating agency's or individual's use of the EEOC national computer, and transmitted and received by the terminal in the D.C. office, a chronologically generated national EEOC case number assigned, and the digital information is digitally "date stamped" as received, within 180 days.

Equitable Tolling

3. Review should be granted to reaffirm that district courts must fully and fairly address equitable tolling considerations, so appellate courts are not needlessly involved in decisions where agency action may not be in precise accord with a district court's interpretation of agency action, or related working documents.

PARTIES TO THE PROCEEDING

The following persons have an interest in the outcome of this case:

Batson, John P. (attorney for plaintiff)
Bell, Charles T., Jr. (EEOC)
Bowen, The Honorable Dudley H., Jr (Judge S.D.Ga.)
Duffy, Robert P., Esq. (EEOC)
G.I.W. Industries, Inc. (defendant/appellee)
Jones, Sheryl, (RCHRC)
KSB America Co. (defendant/ appellee)
Ogletree, Deakins, Nash, Smoak & Stewart (attorneys for defendant)
Prescott, Nancy (plaintiff/appellant)
Reams, Gwendolyn Young, Esq. (EEOC)
Sands, Robert O., Esq. (attorney for defendant)
Snapp, William P., Esq. (EEOC)
Starr, Susan L.P., Esq. (EEOC)
Stewart, C. Gregory, Esq. (EEOC)
Thomas, Frank (RCHRC)
Williams-Kimbrough, Bernice (EEOC)
Wheeler, Carolyn L., Esq. (EEOC)

TABLE OF CONTENTS

Questions Presented..... i
List of Parties..... ii
Table of Contents..... iii
Table of Citations..... iv
Opinions Below..... 1
Statement of Jurisdiction..... 1
Statutes Involved..... 1
Statement of the Case..... 2
Reasons for Granting the Writ
1. *Worksharing Agreement*..... 11
2. *Electronic Filing*..... 17
3. *Equitable Tolling*..... 22
Conclusion..... 26
Appendix.....Separate Volume

TABLE OF CITATIONS

Brown v. Crow,
963 F.2d 895 (6th Cir. 1992).....passim
Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.,
467 U.S. 837, 842-845,
104 S.Ct. 2778, 2781-2783,
81 L. Ed.2d 694 (1984).....12
E.E.O.C. v. Commercial Office Products Co.,
486 U.S. 107, 108 S.Ct. 1666 (1988).....passim
EEOC v. Shell Oil Co.,
466 U.S. 54, 80 L.Ed.2d 41,
104 S.Ct 1621 (1984).....13
EEOC v. Superior Temporary Services, Inc.,
56 F.3d 441 (2nd Cir. 1996).....13
Ford v. Bernard Fineson Development Center,
81 F.3d 304 (2nd Cir. 1996).....13
Griffin v. City of Dallas,
26 F.3d 610 (5th Cir. 1994).....13
Hart v. U.S.,
Tenth Cir. No. 96-5152 (Spring 1997).....25
Hong v. Children's Memorial Hosp.,
936 F.2d 967, appeal after
remand, 993 F.2d 1257,
cert..denied, 114 S.Ct 2695,
129 L.Ed.2d 826 (7th Cir. 1991).....13
Love v. Pullman,
404 U.S. 522 (1972).....passim
Marlowe v. Bottarelli,
938 F.2d 807,
cert. denied (7th Cir.1991).....13
New York Gaslight Club, Inc. v. Carey,
447 U.S. 54, 100 S.Ct. 2024,
64 2.LEd.2d. 723 (1980).....13

Peterson v. City of Wichita, Kansas,
888 F.2d 1307 (10th Cir. 1989).....18
Petrelle v. Weirton Steel Corp.,
953 F.2d 148 (4th Cir. __) 13
Reynolds Metal Co. v Rumsfield,
564 F.2d 663 (4th Cir 1977).....13
Smiley v. Citibank (South Dakota), N.A.,
___ U.S. ___,
116 S.Ct. 1730, 1733 (1996).....11
Sofferin v. American Airlines,
922 F.2d 552, on remand,
785 F. Supp. 780 (7th Cir. 1991).....13
Williams v. Washington Metro Area Transit Auth.,
721 F.2d 1412 (D.C. Cir. 1983).....7,22,23
Worthington v. Union Pacific,
948 F.2d 477 (8th Cir 1991).....13
Zipes v. Transworld Airlines, Inc.,
455 U.S. 385, 393,
71 L. Ed.2d 234,
102, S.Ct. 1127(1982).....passim

Statutes

28 U.S.C. 1254(1).....1
42 U.S.C. § 2000e(Title VII).....13,14,21
42 U.S.C. § 2000e-4(f).....15
42 U.S.C. § 2000e-4(g)(1).....14,19
42 U.S.C. § 2000e-4(g)(3).....19
42 U.S.C. § 2000e-5.....14
42 U.S.C. § 2000e-5(b).....14,19

Regulations

29 C.F.R. § 1601.8.....passim
29 C.F.R. § 1601.12.....15

29 C.F.R. § 1601.13.....14
29 C.F.R. § 1601.13(c).....6
29 C.F.R. § 1601.74(a).....passim
29 C.F.R. § 1601.74(b).....24
29 C.F.R. § 1610.4.....24

Ordinance

Richmond County Ordinance, Sec. 14(j).....4,8,12

Miscellaneous

Fed.R.Civ.P. 9(c).....5

OPINIONS BELOW

The material order of the United States District Court for the Southern District of Georgia ("District Court") granting summary judgment is found in the Appendix ("A.") at A.1-4 (R.1-23), and the District Court's denial of a motion for reconsideration is found at A.5-8. (R.1-34). A timely appeal followed. (R.1-28 & 35).

The decision of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") summarily affirming the District Court is unpublished, and is found at A.9. The Eleventh Circuit denied the petition for rehearing on April 30, 1997. (A.12).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The statutes and other legislated provisions are found in the Appendix at 11-18.

Portions of the Constitution, the United States Code, the Code of Federal Regulations and the Ordinance creating the Richmond County Human Relations are included in the Appendix.

STATEMENT OF THE CASE

Statement of Facts

The issue is whether a Title VII charge, which was filed within 180 days with an agency which appeared to have authority to treat such charges as timely on receipt of filing was timely filed. A written, verified allegation of facts stating possible discrimination by an employer in an adjoining county, was filed on either the 171st or 174th day[1] at a cooperating agency, the Richmond County Human Relations Commission ("RCHRC"), designated by the EEOC pursuant to 29 C.F.R. §§ 1601.8 and 1601.74(a) as a place where charges may be filed. (R.1-15-Thomas Aff.; Durrette Aff.).

The District Court used the date stamp of 09/28/94 on the paper charge, which had been sent from the RCHRC to the Atlanta EEOC as the filing date. (R.1-23-2). This date was outside 180 days.

The employee asserted the charge should be timely on three grounds: (1) By due deference to longstanding agency interpretation and application of the self-executing, mutual agency designation, in the EEOC Workshare Agreement, and overwhelming case law supporting the EEOC's position regarding the Workshare Agreement on agency designation and self-execution; (2) By date stamp filing of the written, verified charge information, converted todigital form, received in the D.C. terminal of the EEOC nationwide computer system, which computer date-stamped the information as having been received within 180 days; or, (3) The unique facts establishing equitable

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[1] The Plaintiff worked all day on the 25th of March. An argument can be made she was not terminated effectively until March 28th, 1994, therefore the paper charge, which was filed on 9/15/94 with the RCHRC was filed on the 171st or 174th day. (R.1-15 Durrette App. ¶13, Ex. C at 13 logbook).

tolling and this Court's precedent declaring filing not jurisdictional.

The language of the Workshare Agreement which establishes mutual agency and self-execution of filing receipt, for the purposes of the timeliness determination is at Section II. A, which states:

> II. Filing of Charges of Discrimination
>
> A. In order to facilitate the assertion of employment rights, the EEOC and the FEPA each designate the other as its agent for the purpose of receiving and drafting charges.

(R.1-15-Thomas Aff. Ex. A) (A.40). Other considerations in the Workshare Agreement relate to deferral, substantive jurisdiction and administrative, conciliation issues, between the two agencies.

The District Court focused on whether the RCHRC could "accept" the filing, because it found language in the Workshare Agreement which restricted its substantive investigative authority to Richmond County. (R.1-23 & 34) (A.1-4 & 5-9). The District Court's logic was that even though the charge was received within 180 days by the RCHRC, because the employer was in an adjoining county, where there was no state or local law prohibiting discrimination, the RCHRC had no authority to investigate or conciliate and therefore the RCHRC had no "mutual jurisdiction" at the time of the receipt of the filing, and therefore the filing could not be timely with the RCHRC. (See I.A.&B. at A.39&40 "to the extent of common jurisdiction", I.B.). It was this last step in the logic, where no distinction was made between filings and substantive matters relating to jurisdiction.

The District Court determined that the FEPA could not be an agent of the EEOC for filing, deciding that the limitation to mutual jurisdiction in the precatory language was controlling.

(Order, R.1-23-4) (A.4). (Agreement, R.1-15-Thomas Aff., Ex. A) (A.39&40). The two separate portions of the Workshare Agreement, Sections I.A. and II.A., are not on their face, mutually exclusive, because a distinction exists between receipt of the charge and investigation of the charge, at least if one accepts that filing is not jurisdictional. *Zipes v. Transworld Airlines, Inc.*, 455 U.S. 385, 393, 71 L. Ed.2d 234, 243, 102, S.Ct. 1127, 1132 (1982). The District Court chose the interpretation limiting the RCHRC's authority to be an agent of the EEOC for purposes of filing only to Richmond County, where it had authority to investigate and conciliate. (R.1-23) (A.1-5).

However, the creating ordinance of the RCHRC does have language which would authorize the RCHRC to be an agent of the EEOC to "receive" charges without regard to location of an employer. The RCHRC may "receive, initiate, investigate and pass upon complaints alleging discrimination ..." without regard to any connection with Richmond County. (Richmond County Ordinance, passed 01/18/83) (A.19 at Section 14(j)). This was pointed out to the District Court. (R.1-25-Brief of Plaintiff, in support of motion for reconsideration at 4).

By the Workshare Agreement, as interpreted by EEOC and the local FEPA, the RCHRC, and their longstanding practices, both agencies considered the charge timely filed. (R.1-15-Thomas & Durrette Affs.); (R.1-30; ¶20);) (R.1-32; ¶20; EEOC Dist. Dir. Williams-Kimbrough). By inference, the charge may also be considered timely filed by the agencies because it was not dismissed. Also, the EEOC paid the RCHRC for processing the charge, and it would not have, had the charge been untimely. (R.1-25-Thomas; Inference).

After the 09/15/95 filing no one at the agency took any action to notify the Plaintiff, or her counsel, that the filing was not complete. (R.1-25; Batson Aff.).

After receiving the paper charge, the FEPA, consistent

with EEOC training and practice, entered the charge information into the nationwide EEOC computer on 09/19/95. (R.1-25 Jones; R.1-30 & 32 Column AO date). The information, in digitized form, of the written, verified charge, was received by the EEOC computer terminal in Washington, D.C., on 09/19/95, within the 180 days. (Kimbrough Aff., Ex. A, Column 10) (A.20-24).[2] The EEOC computer assigned a national, chronological number and effectively date-stamped the receipt by storing memory of the transaction in the hard drive to make printouts, such as Exhibit A. (*Id.*) The RCHRC employee in Augusta put the EEOC number from the EEOC computer on the charge, as she averred it was her handwriting on 9/19/95, the date of the computer transmission. (R.1-15-Durrette Aff., ¶6, re. Ex. B). The electronic filing was transmitted to the Atlanta office, which acknowledged receipt of the digital information of the charges on 09/23/95. The paper charge was mailed to Atlanta and received 09/28/95; although the contract and Agreement requires that charges be forwarded from the RCHRC within two days of receipt, which occurred on 09/15/95. (R.1-15 Thomas Aff. Ex. A, II.E.; A.41).

Course of Proceedings

The complaint generally pleaded the condition precedent that "[j]urisdiction is ... based upon a charge timely filed with the EEOC and Richmond County Human Relations Commission." (R.1-1-1 ¶3). The answer (without the specificity and particularity referenced in Fed.R.Civ.P. 9(c), and which would later emerge in the Employer's response in their motion for summary judgment) stated, "the plaintiff failed to comply with the procedural prerequisites under Title VII...". (R.1-5-2, Second Defense).

When the Employer filed its summary judgment and

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[2] The Kimbrough Affidavit in ¶17 references the "ninth column" and the "AO date", but the AO date is in the tenth column. (A.24).

statement of undisputed material facts, it argued that the paper charge, date-stamped 09/28 by the EEOC, was not timely filed and that plaintiff was represented by counsel. (R.1-12-2). The Employer also asserted, "[t]here is no state or local agency in Georgia with jurisdiction to grant or seek relief for employment discrimination occurring in Columbia County, Georgia". (*Id.* ¶ 13). There was no language disputing the longstanding apparent agency or the FEPA designation in the C.F.R. § 1601.74.

There is nothing about what the lawyer failed to do.

In a footnote, in their opening memo, Defendant stated "...this filing was a nullity since plaintiff was not employed in Richmond County." (R.1-11-5 n.4).

Plaintiff put forward facts that the filing had been made only with RCHRC, and facts about the RCHRC and the Worksharing Agreement. (R.1-15). Title 29 C.F.R. § 1601.74 lists the RCHRC as an agency which can accept charges as a designated representative and 29 C.F.R. § 1601.8 states that charges can be filed with "designated representatives" of the EEOC. (A.14&17). The Workshare Agreement, and the actions of the RCHRC makes the RCHRC an apparent agent of the EEOC, was also argued. 29 C.F.R. § 1601.13(c) Agreements; 29 C.F.R. § 1601.74 Designated agencies. (R.1-15-#10) (A.17&18).

Plaintiff asserted deference to the EEOC's longstanding interpretation and application of the Workshare Agreement, by which the two agencies considered one another mutual agents for receiving charges. RCHRC Director Thomas believed a Worksharing Agreement had been in effect "since approximately 1982". (R.1-15-Thomas ¶10). Thomas considered the filing timely. (*Id.* ¶9).

Once filed, the agencies could make plenary jurisdiction and administrative decisions, about which agency had jurisdiction and authority, or obligation, to begin the conciliation process, or take substantive action, without fear of

missing deadlines. (R.1-14&15-Thomas, RCHRC Director and Clerk, Ms. Durrette Affs.).

As to the beginnings of the electronic filing theory, the Affidavit of RCHRC intake worker, Ms. Durrette, referred to logging the EEOC number in the RCHRC log book, after the, EEOC terminal in Washington, D.C. had received computer notice of the charge, by inference, and then wrote the EEOC number, for the received charge, in the log book and on the charge. (R.1-15-Durrette ¶13; Inference). A few days before the 28th of September Ms. Durrette mailed the paper charge to Atlanta.

Plaintiff argued actual agency based on the reciprocal agency language of the Agreement (See R.1-15-Thomas Aff. Ex. A at ii[II]), and based upon a history of receiving such charges, the RCHRC being paid to do so, and the EEOC considering them timely filed; even for out of county employers. (R.1-14-7).

Plaintiff cited *Williams v. Washington Metro Area Transit Auth.*, 721 F.2d 1412 (D.C. Cir. 1983) and perfected the legal basis to require a review of the evidence for equitable tolling. (R.1-14-2 Plaintiff's Brief in opp. to sum. judgment). The Defendants did not assert as a material fact or law that Plaintiff was not entitled to tolling. (R.1-12). Defendants stated plaintiff had been represented by a lawyer, but they had not articulated any act which when informed, the lawyer had not completed. (*Id.*). The Defendants offered no evidence of prejudice. (*Id.*).

When Defendants responded to Plaintiff's response, the Defendants specifically stated the nature of this geographical, jurisdiction argument. (R.1-19). They stated that Plaintiff had to prove the authority of the RCHRC to enter into any Agreement with the EEOC. (R.1-19-4).

In Plaintiff's brief in support of the motion for reconsideration Plaintiff argued that the Ordinance does give RCHRC authority to "receive" charges regardless of the county

of the employer. (Ordinance R.1-25-4) (A.19 Section 14(j)).

The District Court issued its Order granting the employer's motion for summary judgment, finding, in verbage only:

> This requirement of filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite, but instead, it is in the nature of a statute of limitations. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1981) [sic].

(R.1-23-2). The District Court did not mention the tolling consideration of *Zipes* in its recitation of the law. Although the District Court cited the case, it disregarded the principle that EEOC filings were not jurisdictional, and ruled exactly as if they were.

The District Court analyzed the two sides of the Agreements' interpretation, with no reference to EEOC's need to cooperate with other agencies. (R.1-23).

The District Court's first order is devoid of any consideration of equitable tolling based on the undisputed if not overwhelming evidence of apparent agency. (R.1-23).

The Plaintiff then filed a motion to reconsider and for new trial. (R.1-28). Plaintiff filed further evidence to expand on the EEOC computer based filing, and receipt of the digitized charge by the central computer in Washington D.C. The RCHRC believed the charge was timely. The EEOC computer system, had been in place since 1994. (R.1-25-Jones). The EEOC system received the information and then issued a number for a charge received on 09/19/94. (R.1-25-Jones Aff.). By inference had the EEOC computer not received the charge on that date, an EEOC number would not have been issued, because computers operate on linear, mathematical logic - when operating.

The EEOC computer in the RCHRC office is one reason

the RCHRC appeared to have EEOC authority. The RCHRC received charges for the EEOC, and then, through the EEOC computer system, filed them, and then in paper form, mailed proof of the computer filing to Atlanta, without concern for getting the paper charge to Atlanta before the deadline date; which had been noted in the log. (R.1-15-Durrette Aff. & Thomas Aff. Ex. C Dual Date). This also explains, by inference, why Plaintiff's counsel was not notified of a timeliness or jurisdiction problem. (R.1-25-Batson).

In the reconsideration the Plaintiff argued *Brown v. Crow*, 963, F.2d 895 (6th Cir. 1992)(deferral agency mistake in applying Workshare Agreement not held against claimant) (R.1-24-4&5), and submitted declarations relating to further details of equitable tolling. (R.1-25-4).

The Plaintiff argued that Due Process and Equal Protection required that the EEOC be a party to this litigation. (R.1-24-4).

Plaintiff and the EEOC filed further support for the apparent agency that EEOC and RCHRC considered the RCHRC 9/15/94 filing as "EEOC received"; regarding the Workshare designation, self-execution of filing theory; as well as evidence that the EEOC computer had received the filing on 09/19/94. (R.1-29&30;32).

The District Court denied reconsideration. There is no consideration of the electronic filing in the Reconsideration Order. (R.1-34) (A.5-9). There is no discussion of the EEOC, RCHRC, or counsel's affidavits with respect to tolling, notwithstanding citing *Brown v. Crow*, *supra.*, and the District Court's citing of *Zipes*. Although the District Court cited *Zipes*, and referenced a factor relevant to a portion of the principle of equitable tolling. The District Court concluded:

> There is no doubt that the result is harsh to a plaintiff who would have little reason to know the details of an inter-agency agreement. However, a harsh result cannot be used as the

> excuse to dismantle the law in a result-oriented quest for subjective fairness.

(R.1-34-4). The District Court recognized the manifest injustice of not allowing tolling in this case, even though it was unwilling to consider the case law, which made this relevant. The District Court held firm to its singular contract interpretation, disregarding the public purpose of EEOC. The District Court characterized the reconsideration as "predicated on essentially the same argument previously advanced", mutual agency designation for receiving filings, and denied the motion. (R.1-34-3). The Order did not address the electronic filing issue.

On appeal to the Eleventh Circuit the Plaintiff raised the following issues: (1) Worksharing Agreement interpretation and application; (2) Electronic Transfer; (3) Equitable Tolling; and, (4) Whether the District Court abused its discretion in not considering the evidence submitted in reconsideration. The EEOC submitted an *amicus* brief, selected portions of which are at A.25-36. The EEOC argued its interpretation and application of its Workshare Agreement, and that the agency's position should have received deference. (A.28-33). Tolling or equity and electronic filing arguments were also asserted. (A.35&36) (A.36&37).

The panel of the Eleventh Circuit on February 26, 1997, found as follows:

> We agree with the district court for the reasons stated in its dispositive orders ...[dates]...that appellant's claim is time barred. In addition, we find no abuse of discretion in the district court's denial of appellant's motion for reconsideration....

The plaintiff filed a motion for reconsideration which was also summarily denied on April 30, 1997. (A.10). This petition followed.

REASONS FOR GRANTING THE WRIT

Worksharing Agreement

1. When a charge is filed with an EEOC cooperating agency, or individual, must a plenary jurisdictional determination be made, and proper "geographic", or other similar subject matter jurisdiction be shown at the time of filing, to find that the charge is timely filed, or does the mutual agency designation of the EEOC's standard Workshare Agreement create a filing, on receipt of the written, verified charge by the cooperating agency, given the EEOC's statutory authority and mandates.

This appeal is occasioned by the District Court's erroneous reading or application of the Workshare Agreement. (Order R.1-23) (A.1-5). The District Court chose the Employer's interpretation of the Workshare Agreement, which created a geographic jurisdiction requirement which requires reference to evidence beyond the face of the charge, when the charge is filed or received, and timeliness determined. The District Court added a geographic jurisdiction element to the timeliness of the filing determination. (A. 3&4).

In taking this course of action the District Court jeopardized the simultaneous filing mechanism of Workshare Agreements used by 118 of the agencies listed in 29 C.F.R. §1601.74. (*See e.g.*, A.17-18 for small portion of places where to file a charge).

To reach this position, which flies in the face of the principle of *Zipes v. Transworld Airlines*, 455 U.S. 385 (1982), that EEOC filings are not jurisdictional, the District Court also disregarded the principle of deference to agency interpretation. Where the agency's interpretation, or action, is reasonable, in relation to its statutory authority and mandates, agency position should receive deference from the court, and be accepted. *Smiley v. Citibank (South Dakota), N.A.*, __ U.S.__, 116 S.Ct.

1730, 1733 (1996), (citing *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845, 104 S.Ct. 2778, 2781-2783, 81 L. Ed.2d 694 (1984). Even if an argument can be made for a different interpretation, if reasonable, the agency's position should prevail. A Workshare Agreement had been used in the manner suggested by the agencies since the early 1980's. (R.1-25 Director RCHRC, Thomas Aff.). RCHRC employees were trained by the EEOC that receipt by RCHRC was a timely filing. (*Id.*). The EEOC designated the RCHRC as an FEPA where a charge could be filed by making this relationship formal, and published in the Code of Federal Regulations. 29 C.F.R. § 1601.8 & § 1601.74. (A.14 17 & 18). There are no footnotes in the C.F.R. setting limitations of the RCHRC's FEPA authority, like that of the Austin (Tx) Human Relations Commission listing. (A.17&18). (See also, EEOC Brief at A.29,n.7, arguing that the RCHRC is a "deferral" agency, proving that confusion abounds). In the District Court the EEOC filed the Affidavit of the District Director who affirmed the mutual agency designation of the Workshare Agreement. (R.1-30-3&4; 32-3&4).

The language in the Workshare Agreement, of mutual agency designation, can appear to appoint the RCHRC as a agent for receipt of filings, given Section 14 (j) of the RCHRC Ordinance, which allows such activity without regard to any authority for action within Richmond County. (A.19).

The RCHRC appeared to act for the EEOC and there was no notice to Plaintiff or her attorney that the deadline would not be met with the filing. (R.1-25 Batson). The existing law at the time was that Title VII agency filings are not jurisdiction matters. *Zipes*, *supra*.

In response to the motion for summary judgment the Plaintiff argued that "each [agency] designate[s] the other" pursuant to the Workshare Agreement. (R.1-14-3&4). In the reconsideration Plaintiff cited *Brown v. Crow*, 963 F.2d 895, 900 (6th Cir. 1992), which also references in n.2 at 877 cases

discussing the "self-executing" terms of agreements. (R.1-25-3). Authority from the circuits support the self-executing language by the mutual designation. *Ford v. Bernard Fineson Development Center*, 81 F.3d 304 (2nd Cir. 1996); *EEOC v. Superior Temporary Services, Inc.*, 56 F.3d 441 (2nd Cir. 1996); *Petrelle v. Weirton Steel Corp.*, 953 F.2d 148 (4th Cir. __); *See also, Reynolds Metal Co. v Rumsfield*, 564 F.2d 663 (4th Cir 1977) (government contractor brought action challenging memo of understanding between DOL contract company and EEOC); *Griffin v. City of Dallas*, 26 F.3d 610 (5th Cir. 1994) (as agent of TCHR under workshare, charge filed with EEOC simultaneously); *Marlowe v. Bottarelli*, 938 F.2d 807, *cert. denied* (7th Cir.1991); *Sofferin v. American Airlines*, 922 F.2d 552, on remand, 785 F. Supp. 780 (7th Cir. 1991); *Hong v. Children's Memorial Hosp.*, 936 F.2d 967, appeal after remand, 993 F.2d 1257, *cert. denied*, 114 S.Ct 2695, 129 L.Ed.2d 826 (7th Cir. 1991); *Worthington v. Union Pacific*, 948 F.2d 477 (8th Cir 1991). The writ should be granted to square the ruling herein with those of other jurisdictions, which reasonably address the practical administrative aspects of EEOC timeliness issues, as resolved by the longstanding interpretations Workshare Agreement's mutual agency designations, contrary to rulings in the Courts below.

The adequacy of the charge at filing is based on minimal requirements, and proof of disputed facts, including facts relating to Title VII subject matter, should be reserved for trial. *See e.g., EEOC v. Shell Oil Co.*, 466 U.S. 54, 80 L.Ed.2d 41, 104 S.Ct 1621 (1984). The proceedings before the EEOC are supplemental to state proceedings and judicial remedies, and therefore, a charge ought not have to demonstrate judicial factors of geographic of jurisdiction when timeliness should be determined as of the time of filing by the filing. *See e.g., New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 100 S.Ct. 2024, 64 LEd.2d. 723 (1980).

When Congress created Title VII it established a

nationwide agency, to investigate and conciliate claims of discrimination. In determining what action would trigger the agency to act, or protect rights in case conciliation should fail, Congress refers to the filing of charges. 42 U.S.C. § 2000e-5(b), *et seq.* Congress did not specifically define what a charge needed to contain, or include, in the Definition section. *See,* 42 U.S.C. § 2000e [§ 701]. The statute does not require a demonstration of geographic jurisdiction at the time of filing, within the, or of the, "cooperating private agency or individual." Such agencies or persons have no self-evident "jurisdiction", yet Congress authorized the use of private agencies and individuals, in cooperation with the EEOC to carry out its mission more efficiently. 42 U.S.C. § 2000e-4(g)(1). (A. 11&12). The "charge" is notice to the agency to stop the running of the 180 day period and to make the administrative wheels start turning efficiently.

Congress realized the charge was a document which would be used to implement a law providing a cooperative conciliation process between parties. Field offices nearby, but not within the jurisdiction, could conceivably service more than one state in the conciliation process. It was not necessary to show, or make geographic jurisdiction, determinations for filing purposes. The agency could take its "conciliation court", as it were, to the parties, after receiving notice to act. Filing could occur, and EEOC timeliness set, and then plenary and administrative decisions made. If a state agency should process the charge, it would be sent to the agency, but deemed already received by the EEOC. *See,* 29 C.F.R. § 1601.13 Filing; deferrals to state agencies.

Congress gave the EEOC broad latitude to set the appropriate substance of charges, in that a charge "shall contain such information...as the Commission requires." 42 U.S.C. § 2000e-5 [§ 706](b)(A.12). The name and address of the employer is necessary so the employer can receive notice of the charge, but the Commission has never required a "geographic

jurisdiction" determination to toll the running of the 180 days and begin the beginning of the conciliation process. 29 C.F.R.§1601.12. Further, as is addressed in Reason 2 below, the EEOC was given the same expansive authority to determine the "form" of the charge, as it was in its selection of agents. *Id.* The EEOC was given the power to set up offices where necessary; where one would think they could independently contract with cooperating individuals. 42-U.S.C. §2000e-4(f). At these offices, the EEOC may "exercise any or all its powers at any place." *Id.*

The EEOC's Agreement, or practiced interpretation of the Agreement is reasonable, and should receive deference. *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115, 108 S.Ct 1666, 1671, 100 L.Ed.2d 96 (1988); *Zipes v. Transworld Airlines*, 455 U.S. 385 (1982); *Love v. Pullman*, 404 U.S. 522 (1972). The source for guidance in interpreting the Agreement is not general, or state law on contract interpretation. Each party herein could make a case for using various common law principles of interpretation to support their respective positions. Plaintiff could argue that the precatory language in Section I, limiting conciliation jurisdiction, does not limit agency authority to receive charges in Section II. These contract interpretation principles are wholly irrelevant to Congressional concerns of establishing an efficient EEOC, which has to defer to and cooperate with state agencies. (See pages 11-18 Brief of EEOC as *amicus*). (A. 28-36). The source for interpretation of this working agency document, which implements a federal procedure for protection against job discrimination, is in the focus of cooperation between the EEOC and other entities recognized in the statute. The mutual designation of agency for receipt of charges is reasonable on the face of the Agreement, based on a distinction between "receiving", and "investigating" or "conciliating". Given agency application, it is even more reasonable, requiring deference. *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115,

108 S.Ct 1666, 1671, 100 L.Ed.2d 96 (1988). The two agencies herein have operated under the belief that they were mutual agents for receiving such charges in a timely manner since the early 1980's. (R.1-25-Thomas Aff.). The EEOC held the RCHRC out to the public as a place where one could make a charge. 29 C.F.R. § 1601.8 and § 1601.74.

The statute does not prohibit the interpretation sought by the Agency, and the challenged practice is not unreasonable, and it should be upheld. *Love v. Pullman*, 404 U.S. 522 (1972). The "statute guards against... proceedings that are difficult to commence, not against ones that are easily commenced." *Love v. Pullman*, 404 U.S. 522, 525-26 n. 6 (1972). Adding a geographical jurisdiction component to the timeliness issue, when every charge could be filed in the D.C. office is contrary to the will of Congress.

This Court must grant the writ to protect the statute and the EEOC's Workshare Agreements from a judicial interpretation which makes the EEOC inefficient.

Electronic Filing

2. Is a Title VII charge timely filed with the EEOC, where information from a written and verified charge is converted, as required by the EEOC to digital form, by a cooperating agency's or individual's use of the EEOC national computer, and transmitted and received by the terminal in the D.C. office, a chronologically generated national EEOC case number assigned, and the digital information is digitally "date stamped" as received, within 180 days.

If the first issue is decided favorably for the Title VII claimant, this issue need not be reached. On the other hand, as far as the EEOC is concerned, if the state and local agencies cannot be mutual agents by the language of the Workshare Agreements, then this issue of first impression takes on importance or monumental proportions, in the real world of timely filings, and having to get documents back and forth from EEOC and cooperating and deferral agencies. If computerized transmission of information about facts which are readily verifiable, in the case of Title VII, that a verified, written charge existed prior to the entry of the digital information into the national computer system, cannot occur, there will be untold millions spent meeting deadlines; which could be easily managed and administered, if the Court is willing accept that the Commission, by its statutory authority, may require that the form of the information be digitized by the use of the national EEOC computer.

The EEOC has already invested training time and money in the system and counts on it for its daily operation. The RCHRC has had the system since about 1994. (R.1-25-Jones Aff. ¶5).

As a reflection on why the RCHRC took more than two days to send the charge filed with it, to the Atlanta office, where the Workshare Agreement proscribes such a period, (R.1-15-Thomas Aff., Ex. A, §II.E.; A. 41), one need only consider the

advantage the computer offers in conveying information and meeting deadlines. When the charge was brought into the RCHRC, the deadline was noted in the log book. (See log book attached to Durrette Aff., R.1-15) and the dual filing date deadline calculated and listed from the date on the charge as the date of termination. Once the information about the charge was entered, and the EEOC number assigned, the deadline had been met and the rush was over. There was no need to inform the Plaintiff that she needed to file with Atlanta before the 180th day because there was no geographic jurisdiction in Richmond County. Timely filings, by use of the computer, with the information in digitized form, as required by the EEOC, of the written verified charge, can be received and an objective record of receipt maintained efficiently. The result is greater efficiency than the hurried delivery of paper charges. The interest of all will be better served if the Court gives legal sustenance to the receipt of digitized information.

As the population and number of filings increase, the cost of administering just the intake process of receiving filings increases. It will become more important for the efficient and economical operation of the EEOC to rely on computerized filings from written documents elsewhere.

The only case law is related by broad analogy. Charges which are defective may be amended, and the added information relates back to the original date of filing. *Peterson v. City of Wichita, Kansas*, 888 F.2d 1307 (10th Cir. 1989)(subsequently verified charge may meet filing requirements). Even if the paper charge is not sufficient, it can still be "filed" on receipt, and amended later. There is no suggestion that the paper charge can be eliminated, as the statute would seem to prohibit it, the question here is whether the EEOC can use agents to verify that charges exist, and then track and deal with the charges in a modern way, which promotes efficiency.

The EEOC has already decided that the computer is a reasonable means by which to operate, and the Court should

give it deference, because the statute does not compel otherwise, and in fact, gives discretion to the agency to require the information to be put in one form or another. *Love v. Pullman*, 404 U.S. 522 (1972); *E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107, 108 S.Ct. 1666 (1988). The Act says that "Charges shall be in writing... and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). The Act does not say that "only the Commission proper" can receive paper filings. If it suits the Commission to use a digitized form of evidence of receipt of written, verified charges Congress has said that should be the end of discussion. To enable the Commission to better utilize "other agencies, both public and private, and individuals", 42 U.S.C. § 2000e-4(g)(1), "to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with...the Act" the Commission needs to be able to use digitized forms of information. 42 U.S.C. § 2000e-4(g)(3).

This Court approved oral notice of a charge between cooperating agencies, because the Act did not prohibit oral notice. *Love v. Pullman*, 404 U.S. 522 (1972). Oral notice is ephemeral and subject to dispute - as opposed to a computer's capacity to memorialize transactions and dates. To fairly protect the efficiency and integrity of the process brought about by the EEOC national computer system, the decision of the panel should be reversed, and the matter remanded for a trial with full EEOC participation on the issue of electronic filing.

This may be a case of first impression on whether computerized receipt of information from a written verified charge is evidence of a "filing", but the technology need not make it complex. Given the fact that it is undisputed that there is a written, verified charge, then the only question is when has it been filed with the EEOC. See Reason 1 above. The issue is whether a computerized dating of receipt is entitled to the same legal significance as the traditional date stamp; as found its way upon the plaintiff's charge after the paper charge eventually

made its way to the Atlanta office, after the case had been logged into the EEOC national computer, digitized information about the substance of the charge transmitted and received by the EEOC's central terminal, an EEOC case number assigned and a digital date stamp placed in the memory of the computer for 9/19/95 for easy conversion to hard-copy from now until.... There is no good reason not to use the computerized date stamp from the D.C. office as the equivalent of a less modern form of stamp, whether hand stamp or time clock.

To prove timely filing the statute does not require proof that some person at the EEOC has received and is aware of the anything about a particular charge in order to consider it timely filed. Traditionally the date stamp is all that is needed, and who put it on, or what the particular civil servant makes of the charge on the merits is of no moment.

The statute requires that the information about the charge be written and verified, and it requires filing. Receipt by the computer is no different for timeliness determinations than the old method, in particular a time clock. An EEOC office, like a court, could have a time clock, and when a claimant comes in, with a written, verified charge, the claimant could clock it in, with date and time, and then throw it in a basket for later processing; such as assigning a case number, figuring out who has jurisdiction and other matters of substance and jurisdiction as between agencies.

In this case, the computer can do what a time clock can do and more, because it can record that not only that something has been filed, but information which the agency deems important in efficiently processing charges.

This is a matter of great importance. As the case stands now, one could argue that the District Court and the Eleventh Circuit rejected the use of computerized information over the suggestions of the brief filed by the EEOC in the Eleventh Circuit. (A.25-38). Although the specific ramifications of this case cannot be precisely predicted, it is obvious that for the

future, the EEOC must be able to rely on digitized transfers of information in order to operate efficiently and meet its Congressionally charged role of "cooperation" with other agencies. 42 U.S.C. § 2000e.

Equitable Tolling

3. Review should be granted to reaffirm that district courts must fully and fairly address equitable tolling considerations, so appellate courts are not needlessly involved in decisions where agency action may not be in precise accord with a district court's interpretation of agency action, or related working documents.

If the District Court had actually followed the principle that timeliness questions are not jurisdictional, and are therefore subject to equitable tolling, this Court would not be faced with the other issues raised in this petition.

Even though the District Court cited *"Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1981)" (sic) (R.1-23-2)(A.2), the District Court did not complete a tolling analysis, applying the history of facts which led to the filing in this case. (See Order A.1-4). The District Court applied the opposite of equitable tolling — like it added geographic jurisdiction to the filing timeliness issue; disregarded agency principle, that an agent has the authority of the principal for the act in question; and, used principles of contract interpretation to determine the significance of slightly conflicting language in an EEOC Workshare Agreement. This conflict alone, using any interpretation, should have meant that filing agency is separate and distinct from investigative agency, and both can co-exist in one document; or the conflict should have allowed extrinsic evidence, which also should have solved the problem.

The District Court's acknowledgment that:

> a plaintiff would have little reason to know the details of an interagency agreement. However, a harsh result cannot be used as the excuse to dismantle the law in a result- oriented quest for subjective fairness.

cries out for an examination of tolling evidence (R.1-35-4)(A.7). Plaintiff's arguments directly confronted the need for

tolling, when the Agencies' interpretation led to filing difficulties. Plaintiff cited *Williams v. Washington Metro. Area Transit Auth.*, 721 F.2d 1412 (D.C. Cir. 1983) in the Brief in response to the motion for summary judgment (R.1-14-2), and in the motion for reconsideration, she cited *Brown v. Crow*, 963 F.2d 895, 900 (6th Cir. 1992) (deferral agency mistake in applying Workshare Agreement not held against claimant). (R.1-25-3) Equitable tolling was also raised on appeal. (Brief of Appellant filed 9/13/96). The EEOC, in its *amicus* Brief at 19 & 20, argued that equity demanded "that the charge be considered filed with the EEOC once it was received by the RCHRC", citing relevant authority. (A.35 & 36).

The defendant made no showing of prejudice. As required in *Love*, *supra.*, 404 U.S. at 526.

The District Court gave no consideration of any factor to defeat tolling, other than its adherence to its view of the law, which rewrote longstanding agency interpretation of a working document, in the face of Supreme Court precedent to the contrary.

The sole argument made by the Employer insisting that tolling was inappropriate, was the fact that Plaintiff was represented by a lawyer at the time of filing. (R.1-19-5). This argument was not addressed by the District Court, as its ruling was firmly planted in its contract interpretation of the Workshare Agreement, with no consideration of the statutorily required functions of the EEOC in relationship to other agencies and cooperating parties, and least of all the claimant.

The first notice, actual or constructive, the lawyer had that the Workshare Agreement was not self executing as to agency and timely filing, or that the RCHRC was not a place where charges could be filed, contrary to what was listed in 29 C.F.R. §1601.8(A.14) and § 1601.74(a), was the Court's contested Order. (R.1-23)(A.1-4). There are no limiting footnotes in the C.F.R. as to the RCHRC's "jurisdiction" for receiving charges, as a place where charges can be filed; as is

the case with the "footnoted" Austin (TX) Human Relations Commission, which notes that for certain charges it is a "Notice Agency." 29 C.F.R. § 1601.74(a)(A.17&18).

The existence of the "Notice Agency" designation, 29 C.F.R. § 1601.74(b), leads one to the conclusion that the EEOC has given serious thought to cooperating with other agencies to establish these relationships of self-executing, designated agency for purposes of filing. It was more appropriate that the RCHRC would be a Notice agency, for out of County cases and that its "footnote" should read, that "for any employment charge of gender or race, where the employer is outside of Richmond County, the RCHRC is a Notice Agency only." Nonetheless, if the EEOC had papered its trail completely on the issue, it would have reached the same position it did in its Workshare Agreement.

The Plaintiff could show that the RCHRC had operated as if it were an agent of the EEOC for purposes of timely filings since about 1982. (R.1-15-Thomas Aff.).

Further, the Ordinance gives the RCHRC authority to "receive" charges without respect to the location of the employer, therefore even using the District Court's geographic jurisdiction logic, the RCHRC had authority to receive filings, and then begin administrative and plenary jurisdiction decisions regarding conciliation and investigation. Ordinance, Sec. 14(j). (A.19).

The record showed that even if a lawyer were involved, or because a lawyer were involved, tolling was appropriate. The Code of Federal Regulations lists the places where charges may be filed, including the EEOC's D.C. office, the field offices listed in §1610.4 (many outside Georgia), or "with any designated representative of the Commission." 29 C.F.R. §1601.8. The "Designated and notice agencies" are listed in 29 C.F.R. §1601.74. There are 118 of them. Most of them are not limited in their authority by any footnotes.

This Court has not held that mere involvement of a

lawyer bars tolling. This is different from a situation where a lawyer is notified that a first filing was made at the wrong agency and then a subsequent filing made at the wrong agency. This spring the Tenth Circuit issued such a ruling in a case involving the strict notice procedures of the Federal Torts Claims Act in *Hart v. U.S.A.*, Spring 1997 (10th Cir. No. 96-5152). Note also that *Hart* involves a claim against the sovereign, where waiver is strictly construed, but this action involves two private parties, on a matter of public concern, involving a statute with remedial purpose.

True enough, though neither Columbia County nor Georgia have a fair employment law,[3] the filing is not jurisdictional according to *Zipes*, and it was more prudent to accomplish filing in person, than to send the charge through the mail; where the local agency had for years, treated filings with the RCHRC, as timely received for the EEOC.

The Plaintiff also argued that due process and equal protection required that the EEOC participate in the proceedings at the District Court. (R.1-25-4; Plaintiff's Brief in Support of Motion for Reconsideration).

Summary judgment should not have been granted to the Defendant, where reasonable inferences of tolling were in the record. The Defendant did not show there were no material facts in dispute as to proof of equitable tolling. On this record, equitable tolling should have been found, and upset of important agency matters of efficient administration avoided. Review should be granted to avoid further problems of failure of deference.

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[3] But see, EEOC, Brief of *amicus* (A.29 n..7), which argues that because RCHRC is listed in §1601.74 it is a deferral agency, and therefore the 300 day period should apply.

CONCLUSION

For the reasons stated the petition for the writ of certiorari should be granted.

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